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NORTHERN DISTRICT OF CALIFORNIA

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11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 LEE-RAY TARANTINO CO., INC., d/b/a
 14 GOLDEN STATE PRODUCE CO.

C } 07

15 Civil Action No: 5705

CW

16 Plaintiff	17)	18)	19)	20)	21)	22)	23)	24)	25)	26)	27)	28)
v.))))))))))))
29 THEODORAS KOLIATSI, d/b/a/	30)	31)	32)	33)	34)	35)	36)	37)	38)	39)	40)	41)
42 4 TH & GEARY FARMERS MARKET))))))))))))
43 Defendant))))))))))))

MEMORANDUM OF POINTS
 AND AUTHORITIES
 IN SUPPORT OF EX PARTE
 APPLICATION FOR
 TEMPORARY RESTRAINING
 ORDER AND ORDER TO SHOW
 CAUSE RE PRELIMINARY
 INJUNCTION

Plaintiff, Lee-Ray Tarantino Co., Inc. d/b/a Golden State Produce, submits this memorandum in support of its Application for Temporary Restraining Order Without Notice and Order to Show Cause Why a Preliminary Injunction Should Not Issue pursuant to Fed. R. Civ. P. 65 and Preliminary Injunction. Submitted herewith in support of plaintiff's applications are the declaration of the representative of plaintiff and the certification of plaintiff's attorney as to why notice is not required.

INTRODUCTION

Plaintiff is engaged in the business of selling wholesale quantities of perishable agricultural commodities (hereafter "produce") in interstate commerce.

Defendant, Theodoras Koliatsis, an individual doing business as 4th & Geary Farmers Market ("4th & Geary"), in San Francisco, California, and is and was at all times pertinent herein, a dealer of produce subject to license under the Perishable Agricultural Commodities Act, 7 U.S.C. §499a, et seq., ("PACA").

Plaintiff seeks enforcement of the statutory trust established under the PACA, 7 U.S.C. §499e(c), and the regulations issued pursuant thereto, 7 CFR Part 46, 49 Fed. Reg. 45735 (Nov. 20, 1984) (the "PACA regulations"). The Court's jurisdiction is invoked pursuant to 7 U.S.C. §499e(c)(5)(I).

THE PACA TRUST

The PCA was enacted in 1930 to "suppress unfair and fraudulent practices in the marketing of fruits and vegetables in interstate and foreign commerce" and "provides a code of fair play . . . and aid to [agricultural] traders in enforcing their contracts." 49 Fed. Reg at 45737.

In 1984, the PACA was amended to assure that suppliers of produce are paid by imposing a statutory trust on all produce-related assets, such as the produce itself or other products derived there from, as well as any receivables or proceeds from the sale thereof, held by agricultural merchants, dealers and brokers. 7 U.S.C. §499e(c)(2). Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc., 222 F.3d 132 (3rd Cir. 2000); Frio Ice, S.A. v. Sunfruit, Inc., 918 F.2d 154 (11th Cir. 1990). The trust must be maintained

1 for the benefit of the unpaid suppliers, sellers or agents who provided the commodities
2 until full payment has been made. Id. The trust provisions thus offers sellers of
3 produce, "a self-help tool that will enable them to protect themselves against the
4 abnormal risk of losses resulting from slow-pay and no-pay practices by buyers or
5 receivers of fruits and vegetables." 49 Fed. Reg. at 45737.

7 Failure to maintain the trust and make full payment promptly to the trust
8 beneficiary is unlawful. 7 U.S.C. §499b(4). Produce dealers "are required to maintain
9 trust assets in a manner that such assets are freely available to satisfy outstanding
10 obligations to sellers of perishable agricultural commodities[,] and any act or omission
11 inconsistent with this responsibility, including dissipation of trust assets, is proscribed. 7
12 CFR §46.46(e)(1). Dissipation of trust assets, defined as the diversion of trust assets or
13 the impairment of a seller's right to obtain payment (7 CFR §46.46(b)(2)), is forbidden.
14 7 CFR §46.46(e)(1).

17 **ENTITLEMENT TO TEMPORARY**
18 **RESTRANING ORDER**

19 Rule 65(b) of the Federal Rules of Civil Procedure sets forth the standard under
20 which a temporary restraining order may be issued without notice.

21 A temporary restraining order may be granted without written or oral notice to the
22 adverse party or that party's attorney only if (1) it clearly appears from specific facts
23 shown by declaration or by the verified complaint that immediate and irreparable injury,
24 loss, or damage will result to the applicant before the adverse party or that party's
25 attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court
26 in writing the efforts, if any, which have been made to give the notice and the reasons
27 supporting the claim that notice should not be required.

1 In this case, plaintiff, through the declaration of its representative, as well as the
2 Certification of Counsel, has demonstrated that: a) it is a produce dealer and creditor of
3 defendant under PACA; b) it has not been paid for the \$328,344.36 worth of produce
4 that it sold to defendant; c) defendant has tendered four (4) checks to plaintiff in the
5 aggregate amount of \$76,000.00 in partial payment for the produce supplied by plaintiff,
6 which were returned by the bank due to insufficient funds; and d) giving defendant
7 notice before entry of a Temporary Restraining Order will allow defendants to further
8 dissipate PACA trust assets pending a hearing.

9 Such notice will only provide defendant with advance warning that an order may
10 be entered, thereby giving time to defendant to: a) sell or transfer trust assets; and/or b)
11 make further payments of trust assets to liquidate personal liabilities or pay preferred
12 non-trust creditors prior to the entry of the order. Thus, a further loss of trust assets
13 would result if there is notice. Since it is all but impossible to recover trust assets once
14 there has been dissipation, H.R. Rep. No. 543, 98th Cong., 2d Sess. 4 (1983), reprinted
15 in 1984 U.S. Code Cong. & Admin. News, 405, 411, Tanimura & Antle, Inc. v. Packed
16 Fresh Produce, Inc., supra, p. 140; J.R. Brooks & Son, Inc. v. Norman's Country Market,
17 Inc., 98 B.R. 47, 50 (Bkrtcy. N.D. Fla. 1989), the loss to plaintiff and other trust creditors
18 would be irreparable. DiMare Fresh Fruit v. Thomas J. Gatzilis & Co., 774 F.Supp.
19 449 (N.D. Ill. 1991); Gullo Produce Co., Inc. v. Jordan Produce Co., Inc., 751 F.Supp.
20 64 (W.D. Pa. 1990).

21 In addition, defendant has the power to obtain immediate dissolution of the
22 Temporary Restraining Order by payment to plaintiff of the trust moneys that are owed.
23 Alternatively, a prompt hearing will be held on plaintiff's motion for preliminary
24

1 injunction, and defendant can file an immediate application to dissolve the temporary
2 restraining order under Rule 65(b). In the meantime, the status quo is maintained
3 because no assets can be transferred or dissipated.
4

5 Case law supports plaintiff's entitlement to an immediate injunction requiring non-
6 dissipation of trust assets when the produce supplier is not paid. Tanimura & Antle, Inc.
7 v. Packed Fresh Produce, Inc., supra, p. 140 (irreparable injury established and
8 injunction should issue upon a showing that the trust was depleted and payment was
9 not readily forthcoming); Frio Ice, S.A. v. Sunfruit, Inc., supra, p. 159; ("Upon a showing
10 that the trust is being dissipated or threatened with dissipation, a district court should
11 require the PACA debtor to escrow its proceeds from produce sales, identify its
12 receivables, and inventory its assets."); Dole Fresh Fruit Co. v. United Banana Co., 821
13 F.2d 106 (2d Cir. 1987); In re Richmond Produce Co., Inc., 112 B.R. 364, 367 (Bkrtcy.
14 N.D. Cal. 1990).

15 The standard for granting injunctive relief in the Ninth Circuit requires the moving
16 party to show: (1) a strong likelihood of success on the merits; (2) irreparable harm if the
17 relief is not granted; (3) that the threatened injury to the movant outweighs whatever
18 damage the proposed injunction may cause to the opposing party; and (4) the issuance
19 of the injunction will not be adverse to the public interest. Regents of University of
20 California v. ABC, Inc., 747 F.2d 511, 515 (9th Cir. 1984); Los Angeles Memorial
21 Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980).

22 The facts in this case show that the plaintiff is entitled to the requested relief.
23
24

Finally, no bond should be required because defendant already has \$328,344.36 worth of trust assets from plaintiff as security for the issuance of a Temporary Restraining Order.

CONCLUSION

For the foregoing reasons, plaintiff respectfully submits that its Motion for Temporary Restraining Order Without Notice should be granted.

Dated this 9th day of November, 2007.

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